

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 112 of 1988

FOR APPROVAL AND SIGNATURE :

HON'BLE MR.JUSTICE J.M.PANCHAL

and

HON'BLE MR.JUSTICE M.H.KADRI

-
1. Whether Reporters of Local Papers may be allowed
to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy
of the judgement?
 4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?
-

SANTOSHKUMAR @ LION TULSIRAM

Versus

STATE OF GUJARAT

Appearance:

MR KG SHETH for the Appellant.

MR MA BUKHARI, APP for the Respondent.

CORAM : MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE M.H.KADRI

Date of decision: 04/09/96

The appellant has challenged legality and validity of the judgment and order dated November 21, 1987, passed by the learned Addl. Sessions Judge, Kutch at Bhuj in Sessions Case No. 6/87, whereby the appellant was convicted under S.302 of I.P.Code and sentenced to suffer R.I. for life and fine of Rs.1,000/- in default R.I. for six months. The appellant was also convicted under S.324 of I.P.Code and sentenced to suffer R.I. for one year. The learned Additional Sessions Judge, ordered both the substantive sentences to run concurrently.

2. The prosecution case may be summarised as under:

Complainant Kalicharan Dinanath was residing at Ajmer alongwith his wife Nandkumari, daughter Manjula and sons. In the year 1986, complainant Kalicharan alongwith his family members came to Gandhidham with a view to earning livelihood, and started residing there by erecting one hut near Gandhidham Railway Colony. The appellant was plying autorickshaw in Gandhidham. Manjula, the daughter of the complainant came in contact with the appellant, and therefore, after some time, she was married to the appellant. It is alleged that after marriage, Manjula was subjected to cruelty and was beaten by the appellant. It is the prosecution case that the appellant and his sister used to harass Manjula. Because of the ill-treatment meted out to her, Manjula wrote a letter to the complainant at Ajmer that the appellant and his sister were harassing her, and therefore, complainant Kalicharan felt that the life of Manjula was in danger. After receiving the letter from Manjula, the complainant alongwith his other family members came to Gandhidham. The complainant went to the house of the appellant and noticed that there were marks of violence on the body of Manjula. The complainant, therefore, took his daughter Manjula to his relative's house. Manjula told the complainant that her life was in danger and it was likely that the appellant would kill her. The appellant insisted that Manjula be sent to his house. After much persuasion, the complainant agreed that Manjula would be sent to the house of the appellant after Diwali festival, but before she could go to her matrimonial house, the incident took place. From the record it appears that Manjula had initiated maintenance proceedings against the appellant in the Court at Gandhidham. It may be stated that alongwith the family of the complainant,

Brijeshkumar Amarchand, the cousin of the complainant had also come from Ajmer, and was residing with the family.

3. The incident took place on 2.11.1986 around 11.0 a.m. to 12.00 noon. On that day, the appellant had gone to the house of the complainant. After taking snacks and tea the appellant insisted that Manjula be sent to his house. At that time, in the house of the complainant, Nandkumari - the wife of the complainant, Manjula and Brijeshkumar were present. The other children of the complainant were playing in front of the house. The family members of the complainant were reluctant to send Manjula alongwith the appellant. Thereupon the appellant got enraged and caught hold of the hand of Manjula and threatened that he would cut her nose. In a heat of anger, the appellant took out a knife and gave blow on the body of Manjula. Nandkumari, the wife of the complainant tried to intervene and save Manjula. But the appellant gave knife blows to Nandkumari also. Brijeshkumar, the cousin of the complainant, who was present in the house, also tried to intervene and save Manjula and Nandkumari from the assault launched on them by the appellant, and in the process he also received knife injuries, as a result of which he ran away from the house and climbed the staircase of one adjoining house. Sanjay, the son of the complainant, on seeing the violent attack by the appellant on Manjula, Nandkumari and Brijesh went to inform the complainant who had gone to a confectionery shop. Sanjay, the son of the complainant informed the complainant that the appellant had inflicted knife blows on Manjula, Nandkumari and Brijesh and therefore, the complainant in company of his son Sanju @ Sanjay came to the house and saw that Manjula and Nandkumari were lying in a pool of blood. In the meantime, Brijesh also arrived there bleeding from the injuries inflicted to him by the appellant. One Tiwari who was the neighbour of the complainant called police and Manjula, Nandkumari and Brijesh were taken in a police jeep to Rambaug Hospital at Gandhidham. In the company of one Shekharbhai the complainant went to the police station and lodged the complaint against the accused at the Gandhidham Police Station around 12.00 noon, which was recorded by Police Head Constable Atarsingh Shivilal, who was incharge of the Police Station. Head Constable Dilavarsing who was at Rambaug Police Station was informed that Manjula had succumbed to the injuries sustained by her. Therefore, he held inquest of the dead body of

Manjula. Autopsy on the dead body of Manjula was performed by Dr.Jivram Patel, Medical Officer of Rambaug Hospital, Gandhidham, and he also prepared the postmortem notes Ex.18. Mr.Charan, who was at the relevant time discharging duty as Police Inspector, Gandhidham Police Station, took over investigation and went to the place of incident. There he requisitioned the services of two independent panchas and in their presence panchnama of the scene of offence was drawn. P.I. Mr.Charan recorded statements of Sanjay Kalicharan, Babu Kalicharan, etc. After search, the appellant came to be arrested on 3.11.1986 under an arrest panchnama. While in custody, the appellant showed his willingness to produce the knife which was used in the commission of the crime. Therefore, services of two independent witnesses were requisitioned, and in their presence, the knife which was concealed by the appellant was discovered at the instance of the appellant, and a panchnama to that effect was drawn.

4. As the condition of Nandkumari was serious, she and injured Brijesh were removed to Bhuj General Hospital. Bhuj Police Station had sent a yadi to the Executive Magistrate requesting him to record dying declaration of injured Nandkumari. Mr.Karansingh Mulvaji Jadeja, who was, at the relevant time discharging duty as Executive Magistrate at Bhuj, received the yadi from the Bhuj Police Station at 18.30 hours on 3.11.1986, and accordingly he went to the hospital at 18.45 hours. He inquired from the doctor who was treating Nandkumari about the physical condition of Nandkumari. He was informed by the doctor that Nandkumari was conscious and was in fit state of mind to give the statement. Mr.Jadeja, Executive Magistrate, obtained certificate from the doctor to the aforesaid effect. After obtaining the certificate from Dr.Parekh, the Executive Magistrate recorded the dying declaration of Nandkumari. Nandkumari succumbed to the injuries at 6.50 a.m. on 5.11.1986. The dying declaration recorded by Mr.Jadeja was sent to Gandhidham Police Station. Autopsy on the dead body of Nandkumari was performed by Dr.Suresh K. Parekh, Medical Officer, Bhuj General Hospital and postmortem notes were prepared by him which are produced at Ex.25 on the record. P.I.Mr.Charan obtained the copies of the dying declaration and the postmortem notes of Manjula and Nandkumari, and kept the same in the investigation papers. Incriminatory articles in the nature of clothes, bloodstained knife, etc. which were seized

under panchnama, were sent to Forensic Science Laboratory for analysis. After completing the usual investigation, charge-sheet came to be filed against the appellant for the offences under Ss.

of I.P.Code. As the offence under S.302 of I.P.Code is exclusively triable by the Court of Sessions, the case was ultimately committed to the Sessions Court for trial. The case was numbered as Sessions Case No. 6/87 in the Court of the learned Addl. Sessions Judge, Kutch at Bhuj.

4. Charge Ex. 1 was framed by the learned Addl. Sessions Judge against the appellant for the offences under Ss. 302 and 307 of I.P. Code and also under S.135 of the Bombay Police Act. The charge was read over and explained to the appellant to which the appellant pleaded not guilty and claimed to be tried.

5. In order to prove charge against the appellant, prosecution examined following witnesses:

- (i) PW 1 Ex. 5 Complainant Kalicharan
Dinanath
- (ii) PW 2 Ex. 12 Bherumal Meghraj Sindhi, Panch
of arrest panchnama Ex.13
- (iii) PW 3 Ex. 14 Khodabhai Ratnabhai, Panch of
discovery panchnama of knife.
- (iv) PW 4 Ex. 15 Kanaiyalal Khyaldas, Panch of
discovery panchnama of knife.
- (v) PW 5 Ex. 16 Dr.Jivram Karsandas Patel, who
performed autopsy on the dead
body of Manjula.
- (vi) PW 6 Ex. 20 Executive Magistrate Karansing
Mulvaji Jadeja.
- (vii) PW 7 Ex. 23 Mukesh Nandkishore Patel
- (viii) PW 8 Ex. 29 Brijeshkumar Amarchand,
injured eye-witness.
- (ix) PW 9 Ex. 30 Dr.Suresh Kanjibhai Parekh
M.O. of Bhuj General Hospital
- (x) PW 10 Ex. 33 Takubha Kishandas Charan,

P.I. of Gandhidham Police
Station.

(xi) PW 11 Ex. 40 Atarsing Shivilal, Head Const-
-able of Gandhidham Police
Station.

The prosecution also relied upon the documentary evidence consisting of arrest panchnama of the appellant, panchnama of discovery of knife, inquest panchnamas of the dead body of Manjula and Nandkumari, postmortem notes of deceased Manjula and deceased Nandkumari, dying declaration of Nandkumari, panchnama of the scene of offence, report from Forensic Science Laboratory, etc.

6. After the prosecution evidence was over, the accused was questioned generally by the learned Addl. Sessions Judge, and his statement under S.313 of the Code of Criminal Procedure, 1973 was recorded. In his further statement, the appellant has denied to have committed the offence, and stated that at the relevant time, he was standing in Chawla chowk with his autorickshaw and he was arrested by police from that place. According to him character of Manjula, his mother-in-law and Brijesh was not good. He asserted that at the time of incident he was not present at the place of incident.

7. After taking into consideration the evidence led by the prosecution and hearing the learned counsel for the parties, the learned Judge recorded the following conclusions :

- (i) Evidence of Dr.Jivram Patel, PW 5, postmortem notes Ex.18 of deceased Manjula, oral testimony of Dr.Suresh Parekh, PW 9 and postmortem notes Ex.25 of deceased Nandkumari prove beyond doubt that both deceased Manjula and deceased Nandkumari died homicidal deaths.
- (ii) Evidence of Dr.Patel and Dr.Parekh, and the postmortem notes prepared by them prove that injuries inflicted to Manjula and Nandkumari were sufficient in the ordinary course of nature to cause their deaths.
- (iii) Manjula was married to the appellant at Gandhidham and after her marriage she was subjected to cruelty by the appellant as well as his sister, and she was also beaten by the

appellant.

- (iv) Because of the strained relations between the appellant and his wife Manjula, Manjula returned to her parents' house, and filed maintenance proceedings in Gandhidham court.
- (v) The complaint lodged by Kalicharan, the father of Manjula was filed immediately after the occurrence of the incident, wherein the name of the accused was disclosed as the assailant, and there was no delay in lodging the FIR.
- (vi) Evidence of complainant Kalicharan is reliable and is corroborated by his complaint Ex.41 and the oral testimony of Brijesh.
- (vii) Presence of Brijesh at the time of the incident is proved beyond doubt, which is further corroborated by evidence of Dr.Patel, and the injury certificate Ex.19.
- (viii) Evidence of Brijesh is reliable as it is corroborated by evidence of Dr.Patel and the injury certificate, Ex.19.
- (ix) It is proved beyond doubt that Brijesh had sustained injuries during the course of incident when he tried to rescue Manjula and Nandkumari from the assault launched on them by the appellant.
- (x) Oral testimony of Brijesh and the dying declaration of Nandkumari prove beyond doubt that the appellant was the assailant who had inflicted injuries with knife to Manjula and Nandkumari, which resulted into their deaths.
- (xi) Dying declaration of Nandkumari recorded by Executive Magistrate Mr.Jadeja is wholly reliable.
- (xii) Evidence of Executive Magistrate Mr.Jadeja is corroborated by the testimony of Dr.Parekh, which proves beyond doubt that Nandkumari was fully conscious and in fit state of mind to give the dying declaration.
- (xiii) Dying declaration of Nandkumari is truthful and genuine and gives true version of the occurrence.

(xiv) The appellant had strong motive to commit murders of Manjula and Nandkumari as the complainant and his family members were reluctant to send Manjula to the appellant's house because she was subjected to cruelty.

(xv) Oral testimony of Brijesh which is corroborated by injury certificate Ex.19 issued by Dr.Patel and dying declaration of Nandkumari prove beyond doubt that the appellant had voluntarily caused injuries to Brijesh by muddamal article knife which was a dangerous weapon.

(xvi) The prosecution has not proved that the appellant committed offence punishable under S.135 of the Bombay Police Act.

8. In view of the above referred to conclusions, the learned Addl. Sessions Judge acquitted the appellant of the offence punishable under S.135 of the Bombay Police Act, but convicted him under Ss.302 and 324 of the I.P.Code and imposed the sentences which have been referred to earlier giving rise to the present appeal.

9. Mr.K.G.Sheth, learned Counsel for the appellant has taken us through the entire evidence on record. It was submitted by him that Manjula was earlier kidnapped by three dacoits when she was residing at Ajmer and those three dacoits when they tried to again kidnap her, had committed murders of Manjula and Nandkumari, and caused injuries to Brijesh. The learned Counsel asserted that the character of Manjula, Nandkumari and Brijesh was doubtful and there were illicit relations between Manjula and Brijesh, and therefore Manjula was not sent to the house of the appellant. It was strenuously urged that there was delay in filing the F.I.R. and therefore, it is likely that the same was filed after due deliberation to falsely implicate the appellant in the case. The learned Counsel also argued that the dying declaration of Nandkumari was not truthful and genuine and therefore, no reliance should be placed on the same in convicting the appellant. It was also pleaded that the prosecution has not examined independent witnesses who were present at the time of incident and therefore, adverse inference should be drawn against the prosecution. It was further contended that the identity of the

appellant was not established beyond doubt and therefore, the appeal should be allowed.

10. Mr.M.A.Bukhari, ld.APP submitted that there was strong motive for the appellant for committing the murders of Manjula and Nandkumari as deceased Nandkumari who was mother of Manjula was reluctant to send Manjula to her matrimonial home because of ill-treatment to deceased Manjula by the appellant and thus motive is proved beyond pale of doubt. The learned Counsel for the State submitted that the oral testimony of the complainant and Brijesh is reliable and they are corroborated by the dying declaration of Nandkumari and other circumstantial evidence, to connect the appellant with the crime in question. It was submitted by the learned APP that the dying declaration is genuine and truthful and is rightly relied on by the trial court. It was submitted that the appellant with the knowledge and intention to commit murders of Manjula and Nandkumari had inflicted knife blows on the vital parts of the body of both the deceased, and therefore offence under S.302 I.P.Code is clearly made out by the prosecution against the appellant beyond any pale of doubt. It was also pleaded that evidence of injured eye-witness Brijesh also connects the appellant with the offence in question, and therefore, the appeal should be dismissed.

11. Dr. Jivram Karsandas Patel, PW 5, Ex. 16 who was, at the relevant time, discharging duty as Medical Officer at Rambaug Hospital, Gandhidham, had performed autopsy on the dead body of Manjula. In his deposition, he has stated that Manjula had sustained the following external injuries :

- (a) Incised wound through and through from the skin and muscle on the lateral and back of left arm at lower 1/3rd part posterior side - 5 cm x 3 cm x 4 cm.
- (b) Stab wound on the left side of chest at mid axillary line at 4th, 5th intercostal space vertical in shape going radially straight - 3cm x 1 cm x 7 cm.
- (c) Stab wound on the left breast on the outer and interior querdrent, vertical in shape going below skin obliquely downward and medially it pierce in the chest between 6th, 7th space 3cm x 1 cm x 10 cm. deep.

Dr.Patel also found the following internal injuries on the dead body of Manjula :

- (a) 6th rib partly cut on the left outerly.
- (b) Stab wound on the outer wall of left lung 2 cm x 1/2 cm x 1 cm deep hemothorax.
- (c) Peritoneum below diaphragm left was injured.
Diaphragm cut was 2 cm x 1/2 cm.
- (d) Stab wound on the fundal part of stomach.

In the opinion of Dr.Patel, the cause of death was shock due to blood loss due to injury on vital structure. In the opinion of Dr.Patel, the injuries sustained by deceased Manjula were sufficient in the ordinary course of nature to cause death. Dr.Patel has emphatically stated that the injuries found on the dead body of Manjula were possible by muddamal knife which was shown to him.

12. Autopsy on the dead body of Nandkumari was performed by Dr.Suresh K. Parekh, PW 9, Ex. 30. The postmortem notes prepared by Dr.Parekh are produced on record at Ex.25. As per the postmortem notes, on the dead body of Nandkumari, the Doctor found a punctured wound of the size of 15 cms. x 6 cms. on the front part of abdomen, and as a result of this injury, the omentum had come out. There was also another punctured wound of the size of 5 cms x 2 cm x muscle deep on the left part of chest. According to Dr.Parekh the injuries caused to Nandkumari were very serious, and the said injuries were possible by sharp cutting instrument. Dr.Parekh has deposed that the injuries caused to deceased Nandkumari were sufficient in the ordinary course of nature to cause the death. Dr.Parekh opined that the injuries inflicted to Nandkumari were possible by the muddamal knife which was shown to him. The evidence of Dr.Patel, PW 5 and Dr.Parekh, PW 9, supported by the postmortem notes prepared by them at Exs. 18 and 25 respectively prove beyond doubt that Manjula and Nandkumari died homicidal deaths. Therefore, the finding of the learned Addl. Sessions Judge, that both Manjula and Nandkumari died homicidal deaths being just and legal is hereby upheld.

13. Dr.Suresh Kanjibhai Parekh, PW 9, had also examined injured witness Brijesh at Bhuj General Hospital on 2.11.1986. After the examination, Dr.Parekh issued injury certificate which is produced

on record at Ex. 19. The said injury certificate mentions the following injuries sustained by Brijesh:

- (a) Stab wound on the right thigh anterior side, upper part below 5 cms to the right anterior spine 4-1/2 cm. x 1-1/4 cm. x muscle deep.
- (b) Incised wound on the left arm middle 1/3 part laterally and posterior side 5 x 2 cm. x muscle deep.
- (c) Incised wound on left posterior axillary region on right vertical 8 cm. x 2 cm. x muscle deep.
- (d) Stab wound on the left side of back of chest at lateral side 1-1/2 cm. x 1/2 cm. x 5 cm. deep.

In the opinion of Dr.Parekh, the injuries noticed on the body of injured Brijesh were possible by sharp cutting instrument like muddamal knife. It was further deposed by Dr.Parekh that witness Brijesh was discharged from the hospital on 7.11.1986. Oral evidence of Brijesh and Dr.Parekh supported by the injury certificate prove beyond doubt that as a result of knife blows inflicted to Brijesh, he had sustained injuries during the course of the incident. Therefore, the finding of the learned Addl. Sessions Judge to that effect is hereby confirmed.

14. It is an admitted fact that at the time of the incident, complainant Kalicharan Dinanath was not present at his house. PW 8, Ex.29, Brijeshkumar Amarnath who is the cousin of complainant Kalicharan was present when the appellant came to the house of the complainant to take Manjula. Therefore, it would be relevant to discuss and appreciate his evidence. From his evidence the following facts are apparent and stand established. The incident took place on 2.11.1986, which was a New Year Day and the appellant had come to the house of the complainant around 10.00 a.m. or 10.15 a.m. to take his wife Manjula. At that time Nandkumari, wife of the complainant and Manjula were present at the house, and the children were playing in front of the house. Kalicharan had gone to the confectionery shop. The appellant was offered snacks and tea. He insisted that Manjula should be sent with him. At that time, it was conveyed by the witness and Nandkumari that they had already initiated maintenance proceedings against the

appellant. Thereafter also the appellant insisted that Manjula should be sent with him. But Nandkumari told the appellant that Manjula would be sent after the Diwali festival. Thereupon the appellant got enraged, caught hold of the hand of Manjula and cut her nose. Nandkumari tried to intervene and therefore, the appellant inflicted knife blows to Nandkumari. He also tried to intervene, and the appellant inflicted knife blows to him on the thigh portion. Thereafter the appellant inflicted knife blows on the stomach portion of Manjula, and one knife blow was inflicted on the abdominal part of Nandkumari. As witness Brijesh was frightened, he tried to run away with a view to saving his life, but the appellant inflicted knife blows on his left shoulder. On receiving the knife blows, Manjula and Nandkumari fell down whereas witness Brijesh climbed the staircase of the adjoining house, but the appellant chased him and inflicted two knife blows on his back. Because of the knife blows received on his back, he had fallen down, and the appellant had run away. In cross-examination, the witness deposed that he had come to Gandhidham from Ajmer and was residing with the family of complainant Kalicharan. He admitted that he is barber by profession. The suggestion made to witness Brijesh in cross-examination that three dacoits had come to Gandhidham to kidnap Manjula, was denied by the witness. He has also denied the suggestion made in cross-examination that he was having illicit relations with deceased Manjula. In cross-examination, he admitted that Manjula was kidnapped by three dacoits when she was staying at Ajmer, and in that connection a case was pending in the court at Ajmer. In para 7 of his deposition, the witness has stated that Manjula was kidnapped around the time of Shivratri festival. However the witness has emphasised that when Manjula was kidnapped by the dacoits, she was not married. He denied that he had supplied the address of the complainant to the dacoits. He has admitted that as his business at Ajmer became slack, he had come to Gandhidham to earn livelihood. Witness Brijesh was subjected to searching cross-examination by the defence. But the version narrated by him in the chief-examination regarding assault by the appellant on the deceased and him could not be shaken. The defence made serious allegations by way of suggestions about he having illicit relations with Manjula and he being instrumental in calling the dacoits and conspiring with the dacoits to kidnap Manjula on the day of the incident but the witness has clearly and

emphatically denied all the suggestions. In our view the evidence of witness Brijesh gives the true picture of the occurrence and involvement of the appellant in inflicting knife injuries to Manjula, Nandkumari and the witness himself. The version of Brijesh that after the appellant had inflicted knife blows on his thigh portion and as he feared that his life was in danger, he ran away from the hut and climbed the staircase of the adjoining building. This version of Brijesh is corroborated by the panchnama of the scene of offence, produced at Ex.7 which discloses that bloodstains were found on the staircase of the adjoining building on which witness Brijesh had climbed when he was inflicted knife injuries by the appellant. We do not find any error committed by the learned Judge when he has placed reliance on the evidence of injured witness Brijesh. This witness is searchingly cross-examined, but nothing has been brought on record to discredit his version. As the witness received injuries in the course of occurrence, there can be hardly any doubt regarding his presence at the spot. He himself being injured and relative of the deceased, would not spare the real culprit and involve the appellant falsely in such a serious case. No major contradictions and/or omissions appearing in his testimony are brought to the notice of the court. His evidence inspires confidence and worthy of acceptance. His evidence is corroborated not only by medical evidence, but also by evidence of complainant and other witnesses. His testimony proves it beyond reasonable doubt that the appellant killed the two ladies and injured him.

15. The evidence of complainant Kalicharan PW 1, Ex. 5, indicates that after the assault by the appellant on Manjula, Nandkumari and Brijesh, Sanjay his son had gone to Sitaram Confectionary shop to call him. When the complainant reached his house, he found that his daughter Manjula and wife Nandkumari were seriously injured and were lying in profusely bleeding condition. In the meantime, witness Brijesh also returned from the adjoining house in injured condition. He has also denied the suggestion made to him during his cross-examination that three dacoits who had come from Ajmer to kidnap Manjula were responsible for causing deaths of Manjula and Nandkumari. The complainant had emphatically and categorically denied the suggestions made to him on that line. The defence coming out with these suggestions during cross-examination of these two

witnesses was an attempt on the part of the appellant similar to the adage 'catch at a straw'. It is pertinent to note that while the appellant was examined by the learned Addl. Sessions Judge under S.313 of the Code of Criminal Procedure, 1973, no explanation was offered by him that three dacoits who had come from Ajmer, while attempting to kidnap Manjula had caused injuries to witness Brijesh, Manjula and Nandkumari.

16. It is settled legal position that suggestions made in cross-examination is no proof of the allegation. This proposition of law is good both in the case of prosecution as well as defence. Mere hurling of some such suggestions which are denied by the witness can hardly take the place of proof or evidence. The law of evidence is alike both for the prosecution and for the defence. If the appellant wanted to establish his version as regards the allegations made against the witness, he should have led evidence on that score. But such lurking suspicion has no place in the matter of appreciation of evidence. Therefore, we are of the opinion that the suggestions denied by the witness remains only a suggestion and has no evidentiary value at all. The evidence of complainant lends ample corroboration to the version of incident stated by injured Brijesh and will have to be accepted as it is free from embellishments.

17. The prosecution has also relied on dying declaration made by deceased Nandkumari. However, before dealing with the said piece of evidence, it would be advantageous to notice the law relating to dying declaration. Under section 32 of the Indian Evidence Act, 1872, when a statement is made by a person as to the cause of death or as to any of the circumstances, which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased, called the dying declaration, falls in that category provided it has been made by the deceased while in a fit mental condition. It is well settled that conviction can be based on the dying declaration itself provided it is satisfactory and reliable. A dying declaration made by a person on the verge of his death has a special sanctity, as at that solemn moment, a person is most unlikely to make any untrue statement. The sanctity attached to dying declaration

is that a person on the verge of death would not commit sin of implicating somebody falsely. The shadow of impending death is by itself the guarantee of truth of the statement made by the deceased regarding cause or circumstances leading to his death. A dying declaration, therefore, enjoys almost a sacrosanct status as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Court, it becomes very important and reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration by itself can be sufficient for recording conviction even without looking for any corroboration. However, if there are any infirmities of such nature warranting further assurance then the Courts have to look for corroboration. The rule of corroboration requires that the dying declaration be subjected to close scrutiny since the evidence is untested by cross-examination. The declaration must be accepted, unless such declaration can be shown not to have been made in expectation of death or to be otherwise unreliable. Any evidence adduced for this purpose can only detract from its value, but does not affect its admissibility. It is also well settled that it is not necessary that recording of dying declaration should be in the form of question and answer. The persons making dying declaration need not make elaborate and exhaustive statement as to cover each and every aspect of the incident, more so, where the deceased-declarant was, at that time, under severe stress and agony. The Supreme Court has emphasised that shortness of the statement itself guarantees truth. One of the important tests of reliability of dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind. Generally, the following three tests have been devised in judicial pronouncements in order to answer the question whether the dying declaration is true :-

- (1) Was the victim in a position to identify the assailant/s ?
- (2) Whether the version narrated by the victim is intrinsically sound and accords with probabilities ?
- (3) Whether any material part is proved to be

false by other reliable evidence ?

(See: (1)Khushall Rao v. State of Bombay (1958) SCR 552; (2)Tarachand Damu Sutar vs. State of Maharashtra (1962) 2 SCR 775; (3)Kusa and ors. vs. State of Orissa, (1980) 2 SCC 207; (4) Meesala Kundula Bala Subrahmaniyam and another v. State of A.P. (1993) 2 SCC 684; (5)Meesala Ramkrishna vs. State of A.P.,(1994) 4 SCC 181; (6)Goverdhan Raoji Ghyare v. State of Maharashtra, 1993 Suppl. 4 SCC 316; (7) Gangotri Singh v. State of U.P. 1993 Suppl. 1 SCC 387,(8)Smt. Paniben vs. State of Gujarat, A.I.R. 1992 S.C. 1817; (9)State of Rajasthan v. Kishore, JT 1996(2) SC 595; and (10)State of U.P. vs. Ameer Ali, JT 1996(4) S.C. 123.)

To prove the charge against the appellant, the prosecution has relied on the dying declaration made by deceased Nandkumari before Executive Magistrate Mr.Karansinh Mulvaji Jadeja, PW 6, Ex.20 at Bhuj General Hospital. As stated earlier, as the condition of Nandkumari was serious, she was referred by the Medical Officer of Rambaug Hospital, Gandhidham to Bhuj General Hospital for treatment. Bhuj City Police Station sent a yadi Ex. 21 to the Executive Magistrate, Bhuj to record the dying declaration of Nandkumari, who was admitted in Bhuj General Hospital. On receipt of the said yadi, Mr.Jadeja, PW 6, Ex. 20 went to the hospital around 18.45 hours to record the dying declaration of Nandkumari. Before recording the dying declaration, the Executive Magistrate contacted Dr.Parekh, who was treating Nandkumari and ascertained that the patient was conscious and in fit state of mind to give dying declaration. Mr.Jadeja also obtained a certificate from Dr.Parekh to that effect. After obtaining the certificate from the Doctor, Mr.Jadeja questioned Nandkumari regarding the incident and recorded the statement given by her, in question and answer form. The dying declaration so recorded by the Executive Magistrate is produced at Ex. 22 on the record of the case. In the dying declaration, Nandkumari stated that on 2.11.1986 the appellant came to her house to take her daughter with him and when she told the appellant that he might take her daughter after two days, the appellant got enraged and inflicted knife injuries to her. She also declared that the appellant also inflicted knife injuries to her daughter Manjula, and her brother-in-law Brijesh. She also narrated that after inflicting knife

injuries, the appellant had run away, and they were at first taken to Rambaug hospital and from Rambaug Hospital, they were brought to Bhuj hospital. She emphatically declared that the appellant was alone when he had come to her house. She also declared before the Executive Magistrate that when the incident had taken place, she, her daughter and her brother-in-law were present in the house. From the evidence of the Executive Magistrate it is evident that the declarant Nandkumari answered the questions in Hindi language but the said answers were translated by the Executive Magistrate in Gujarati, and therefore, the dying declaration was recorded in Gujarati language. In his deposition, the Executive Magistrate Mr.Jadeja has emphatically stated that when he recorded the dying declaration of Nandkumari, police officers and doctors were not present near the patient. He categorically stated that he is conversant with Hindi language as he has passed higher level Hindi language examination. Dr.Parekh, PW 9, Ex. 30 has categorically testified that he had certified on Ex. 22 that deceased Nandkumari was in a fit state to make statement. In our opinion, the Executive Magistrate has taken all the required care and precaution in recording the dying declaration, and has recorded the same after obtaining certificate from the concerned doctor about the physical condition of Nandkumari. The evidence of the Executive Magistrate read with deposition of Dr.Parekh makes it evident that he made a true and correct record of what was stated by deceased Nandkumari. Though both the witnesses are cross-examined at length, nothing has been elicited so as to doubt their versions. We are of the firm opinion that the dying declaration recorded by Mr.Jadeja, Executive Magistrate, PW 6 is truthful and genuine.

18. As we have come to the conclusion that the dying declaration has passed the test of reliability, conviction can be based on it without any corroboration. However, in the present case, the dying declaration Ex.22 gets ample corroboration from the evidence of injured eye-witness Brijesh, PW 8, Ex.29 and other circumstantial evidence like discovery of knife used in the commission of crime which was smeared with bloodstains and the report of the serologist Ex. 37, which indicates that blood found on the knife was of Group-A, which was the blood group of deceased Nandkumari and Manjula.

19. As discussed earlier, the oral sworn testimony

of injured eye-witness Brijesh and the dying declaration of Nandkumari prove beyond any shadow of doubt that the appellant and the appellant alone was the assailant who had inflicted fatal knife blows to Manjula and Nandkumari, and had caused injuries to witness Brijesh.

20. On the facts and in the circumstances of the present case, the submission of the learned Counsel for the appellant that there was delay in lodging the F.I.R. and the same was filed after due deliberation and the appellant was falsely involved in this case has also no merits, and deserves to be rejected. As the evidence indicates, the appellant had come to the house of complainant Kalicharan at about 10.00 a.m. to 10.15 a.m. He was offered snacks and tea and thereafter some talks had taken place between the appellant and Nandkumari. When the appellant was told by Nandkumari that he might take away Manjula after 2 days, he got enraged and inflicted knife injuries to Manjula, Nandkumari and Brijesh. After occurrence of the incident, Sanju @ Sanjay, the son of Kalicharan had gone to Sitaram Confectionery shop to call Kalicharan at about 11.30 a.m. and the complainant arrived at his house at about 12.00 noon and saw Nandkumari and Manjula lying in serious profusely bleeding condition. The complainant must have been deeply shocked at the ghastly sight of the two ladies who were dear to him, lying in seriously injured condition. The complainant has deposed in his oral testimony before the court that he had become semi-unconscious and after sometime he regained consciousness and thereafter one Shekharbhai had accompanied him to Gandhidham Police Station to lodge complaint against the appellant. PW 11 Atarsingh, Head Constable was in charge of the Gandhidham Police Station, and he recorded the complaint of Kalicharan at about 12.00 noon on 2.11.1986. The said complaint is produced at Ex. 41. In the complaint, name of the appellant is mentioned as the assailant who had inflicted knife injuries to Manjula, Nandkumari and Brijesh. It must be stated that after arrival of the complainant at the house, all the three injured persons were sent to Rambaug Hospital, and thereafter the complainant had gone to lodge the complaint at Gandhidham Police Station. In these circumstances, in our opinion, the complaint was lodged very promptly and it cannot be said that there was any delay whatsoever in filing the complaint. When soon after the occurrence, the F.I.R. is lodged at the police station, it is difficult to believe that a false story

is cooked up. In the complaint the name of the appellant was disclosed as the assailant. The submission that the complaint was filed late, after due deliberation, and the appellant is falsely involved in the case has no merits and is rejected.

21. The learned Counsel for the appellant also challenged the judgment and order of conviction and sentence on the ground that no independent witnesses have been examined in this case. There is no merit in this contention also and the same deserves to be rejected. As discussed hereinabove, at the time when the incident took place, deceased Manjula, deceased Nandkumari and injured Brijesh were present at the house of complainant Kalicharan. After the incident, persons from the neighbourhood might have gathered at the scene of offence. But, their evidence cannot throw any light regarding the actual occurrence because none other than the injured witness had witnessed the actual incident. Section 134 of the Indian Evidence Act provides that no particular number of witnesses shall in any case be required for proof of any fact. It is well settled that it is not the number of witnesses examined nor the quantity of evidence adduced by prosecution that counts, but it is the quality that counts. As stated earlier, injured Brijesh survived and he has unfolded the prosecution story fully and truly. Merely because the injured witness is related, on that count alone, his evidence cannot be discarded from consideration, if the same inspires confidence. On the contrary, in a case like this, such evidence should inspire more confidence because the witness would not allow the real assailant to go scot-free and falsely involve an innocent person in the case. Deceased Manjula and Nandkumari were close relatives of injured witness Brijesh, and he being the close relative would not let go the real culprits and falsely involve the appellant. The prosecution has examined the witness who had seen the occurrence. The evidence of the witnesses examined by the prosecution is reliable. Even after searching cross-examination made by the defence, nothing has been brought out, which would shake the version narrated by the witnesses in their examinations-in-chief. The false plea set up by the appellant in his statement under S. 313 of the Code of Criminal Procedure also deserves to be noticed. In his further statement the appellant claimed that he was not present at the place of occurrence when the incident took place, and was at Chawla Chowk. Thus the appellant has pleaded alibi. It is well settled

that it is for the accused to prove case of alibi to the hilt (See: Hari Chand & Anr. vs. State of Delhi, JT 1996(2) S.C. p.140). The appellant has led no evidence worth the name to prove his defence of alibi and this strengthens case of the prosecution against the appellant. As discussed earlier, ocular account read with medical evidence proves beyond doubt that it is the appellant and the appellant alone who had inflicted knife injuries on vital parts of the body of both the deceased Manjula and Nandkumari with the knowledge and intention to cause their deaths and also injured witness Brijesh. The injuries sustained by deceased were sufficient in the ordinary course of nature to cause death. Therefore, just conviction of the appellant under S.302 of I.P.Code recorded by the learned Addl. Sessions Judge deserves to be upheld and is hereby upheld.

22. During the occurrence, the appellant had caused injuries to eye-witness Brijesh, when he tried to rescue Manjula and Nandkumari. The medical evidence and the ocular evidence of Brijesh prove beyond doubt that the appellant by use of knife which is a dangerous weapon, had caused hurt to witness Brijesh. Therefore, conviction of the appellant under S.324 of I.P.Code recorded by the learned Addl. Sessions Judge is just and proper and is hereby confirmed. As we do not see any merits in the appeal, the appeal is liable to be dismissed.

23. For the foregoing reasons, the appeal fails and is dismissed. Muddamal articles are ordered to be disposed of in terms of the directions given by the learned Judge in the impugned judgment.

abraham*